ESTATE OF ROSE PARSHALL DRAGSWOLF CROW FLIES HIGH

IBIA 00-60 Decided March 7, 2001

Appeal from an order denying rehearing in Indian Probate IP TC 170 R 96.

Affirmed as modified; original probate decision modified.

1. Indian Probate: Administrative Law Judge: Generally--Indians: Trust Responsibility

Administrative Law Judges involved in the probate of Indian estates have a trust duty to ensure that their probate decisions provide clear and precise instructions to the Bureau of Indian Affairs concerning the disposition of trust property.

APPEARANCES: Appellants, pro sese; Wade G. Enget, Esq., Stanley, North Dakota, for Terry Roberts; Marcia M. Kimball, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Ft. Snelling, Minnesota, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from a February 29, 2000, order issued by Administrative Law Judge James H. Heffernan in the Estate of Rose Parshall Dragswolf Crow Flies High (Decedent). That order denied three petitions for rehearing of the original decision in this estate, which was issued by Judge Heffernan on August 31, 1998.

Appellants are Donna Crow Flies High Morgan, June Crow Flies High Lizotte, Howard Crow Flies High, Corrine Crow Flies High Yazzie, Martha Crow Flies High Jarski, Leroy Crow Flies High, and Roseanne Crow Flies High Johnson, who are Decedent's surviving children.

For the reasons discussed below, the Board affirms Judge Heffernan's February 29, 2000, order as modified herein. It also modifies his August 31, 1998, decision.

Background

Decedent executed a will on November 4, 1992, and died on January 9, 1994. She included in her will an interest in property she believed to be hers to devise, specifically a one-half interest in Fort Berthold Allotment 521A. When the property inventory for Decedent's estate was prepared in June 1995, the Bureau of Indian Affairs (BIA) also believed that Decedent owned this interest and so included it in the inventory it submitted to the Office of Hearings and Appeals.

On September 27, 1996, Administrative Law Judge Vernon J. Rausch held a hearing in Decedent's estate. Judge Rausch retired before issuing a decision, and the matter was transferred to Judge Heffernan. On August 31, 1998, Judge Heffernan issued a decision in which he approved Decedent's will, including its purported devise of a one-half interest in Allotment 521A, which he mentioned specifically in the decision. The Judge was unaware at the time that the same property interest had been at issue in Estate of George Dragswolf, Jr., 30 IBIA 188, modified on reconsideration, 31 IBIA 228 (1997), 1/ and that the Board had held in that case that that property interest (as well as all other property in the estate of George Dragswolf, Jr.) had passed to Terry Roberts (and so could not have been a part of Decedent's estate).

Petitions for rehearing of the August 31, 1998, decision were filed by Carmen Fox, Terry Roberts, 2/ and the Superintendent, Fort Berthold Agency, BIA. In his February 29, 2000, order Judge Heffernan denied Fox's petition for lack of standing and Roberts' petition as untimely. With respect to the Superintendent's petition, he stated: "The petition of the Superintendent is hereby denied because the Board has already determined that [Decedent] never owned any interest in Allotment 521A. The Board's mandate should already provide sufficient authority to correct the title records and make the appropriate distribution." Feb. 29, 2000, Order at 3. He also stated: "It is axiomatic that, whether during her lifetime or through her will, [Decedent] cannot give what she does not have to give, and the Board has determined that she did not have any interest in Allotment 521A to give." Id.

Discussion and Conclusions

Appellants first contend that Judge Heffernan lacked authority to modify the provisions of Decedent's will. Clearly, however, the Judge did not modify Decedent's will. He simply recognized that one piece of property referenced in the will did not belong to Decedent and so could not be devised by her.

1/ For earlier Board decisions in Dragswolf, see 13 IBIA 28 (1984) and 17 IBIA 10 (1988).

2/ Fox and Roberts were parties in Dragswolf, as were the Appellants in this appeal.

Next, Appellants contend that Judge Heffernan erred in changing his August 31, 1998, decision after he denied all three petitions for rehearing and where no petition for modification of the property inventory had been filed in accordance with 43 C.F.R. § 4.273. 3/

Where a matter is before an Administrative Law Judge on rehearing, the Judge has authority to modify the original decision in order to prevent manifest error, even though he or she denies the specific petitions for relief which gave rise to the proceeding. Thus, Judge Heffernan had authority in this case to modify his August 31, 1998, decision. Moreover, because the issue raised on rehearing was the same issue that would have been raised in a proceeding under 43 C.F.R. § 4.273, there was no need for the Superintendent or other party to file a separate petition under section 4.273.

The conclusion reached by Judge Heffernan—that Dragswolf governs the disposition of Allotment 521A—was clearly correct. However, the manner in which he reached his conclusion was procedurally confusing for two reasons. First, he denied the Superintendent's petition for rehearing even though he cited no procedural basis for doing so and even though he clearly agreed with the Superintendent on the substantive issue. Second, although he impliedly modified his August 31, 1998, decision, he did not do so explicitly.

3/ 3 C.F.R. §4.273 provides:

"(a) When subsequent to a decision under § 4.240 or § 4.312, it is found that property has been improperly included in the inventory of an estate, the inventory shall be modified to eliminate such property. A petition for modification may be filed by the Superintendent of the Agency where the property is located, or by any party in interest.

"(b) The administrative law judge shall review the record of the title upon which the modification is to be based, and enter an appropriate decision. If the decision is entered without a hearing, the administrative law judge shall give notice of his action to all parties whose rights are adversely affected allowing them 60 days in which to show cause why the decision should not then become final.

"(c) Where appropriate the administrative law judge may conduct a hearing at any stage of the modification proceeding. Any such hearing shall be scheduled and conducted in accordance with the rules of this subpart. The administrative law judge shall enter a final decision based on his findings, modifying or refusing to modify the property inventory and his decision shall become final at the end of 60 days from the date it is mailed unless a notice of appeal is filed by an aggrieved party within such period. Notice of entry of the decision shall be given in accordance with § 4.240(b).

"(d) A party aggrieved by the administrative law judge's decision may appeal to the Board pursuant to the procedures in §§ 4.310 through 4.323."

There is no doubt that the Superintendent was a proper party to seek rehearing in this case. See, e.g., Estate of Walter A. Abraham, 24 IBIA 86 (1993) (A BIA Superintendent is a proper party to seek review of a probate decision which conflicts with the decision in another estate). Thus, upon observing that the August 31, 1998, decision was inconsistent with the Board's decision in Dragswolf, the Superintendent properly petitioned for rehearing.

[1] Administrative Law Judges involved in the probate of Indian estates share the duty imposed upon the Department of the Interior to carry out the Federal trust responsibility toward Indians. E.g., Estate of Wesley Emmett Anton, 12 IBIA 139, 142 (1984); Estate of Helen Ward Willey, 11 IBIA 43, 47 (1983). One of the duties of Administrative Law Judges in this regard is to ensure that their probate decisions provide clear and precise instructions to BIA concerning the disposition of trust property. BIA should not be required to guess what an Administrative Law Judge intends in a decision which controls the disposition (and therefore the ownership) of trust property.

In this case, BIA can undoubtedly discern the Judge's intent. However, by failing to explicitly modify his original decision, Judge Heffernan placed an inappropriate burden on BIA. He would have better fulfilled his trust duty to issue clear and precise decisions by granting the Superintendent's petition and modifying the August 31, 1998, decision to show that Allotment 521A was not the property of Decedent and did not pass under her will. Therefore, while the Board affirms the conclusion reached in Judge Heffernan's February 29, 2000, decision, it makes certain modifications, as described below.

Appellants' final argument is that the property inventory for the estate of George Crow Flies High, through which Decedent purportedly received an interest in Allotment 521A, has not been modified to eliminate that interest. Appellants reason, therefore, that the interest must have passed to Decedent.

It is not clear from the materials before the Board whether the property inventory for the estate of George Crow Flies High has been appropriately modified. 4/ Even if it has not, however, it would not help Appellants here. Under Dragswolf, George Crow Flies High, like Decedent here, did not own the property interest and so could not have devised it to anyone.

4/ At the request of the Superintendent, it is incumbent upon the Administrative Law Judge to issue modifications of the property inventories for any estates affected by the Board's decision in Dragswolf. See 43 C.F.R. § 4.273, supra.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Heffernan's February 29, 2000, order is affirmed as modified to grant the Superintendent's petition for rehearing. His August 31, 2000, decision is modified to show that, upon rehearing, Allotment 521A was eliminated from the property inventory for Decedent's estate.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge